FILE COPY

FILED
SEP 16 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor

NO. 359.

PHILADELPHIA COMPANY, Petitioner,
v.
JULES GUGGENHEIM ET AL.

NO. 360.

PHILADELPHIA COMPANY, Petitioner,
v.
CITY OF PITTSBURGH

NO. 361.

PHILADELPHIA COMPANY, Petitioner,
v.
HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds

REPLY BRIEF OF PHILADELPHIA COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

THOMAS J. MUNSCH, JR.
C. ELMER BOWN
PHILIP A. FLEGER
Attorneys for Petitioner

435 Sixth Avenue,
Pittsburgh, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

INDEX

PAGE

The principles involved in this case do not depend on a peculiar or unique fact situation..... 2

The Circuit Court's decision is not consistent with prior law 4

The Circuit Court's decision cannot be reconciled with this Court's decision in the Dipple case.. 6

The public interest will best be served by a review of the Circuit Court's decision..... 7

CASES CITED

re Hotel Gibson Co., 11 F. Supp. 30 (D.C. Ohio, 1935)..... 4

New York Trust Co. v. New York and Greenwood Lake Railway Co., ... Fed. 2d .... (3 Cir.; July 17, 1946)..... 2

Philadelphia Co. v. Dipple, 312 U.S. 168, 61 S. Ct. 538 (1941) 6

Price v. Gurney, 324 U.S. 100, 65 S. Ct. 513 (1945).. 5

Second Avenue Traction Company v. United Traction Company of Pittsburgh, 328 Pa. 257, 195 A. 25 (1937) 5

Thompson v. Texas Mexican Ry. Co., 324 U.S. 838, 66 S. Ct. 937 (1946)..... 5

TEXT BOOK

Finletter, Thomas K., Law of Bankruptcy Reorganization (1939) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor

NO. 359.

PHILADELPHIA COMPANY, Petitioner,

v.

JULES GUGGENHEIM ET AL.

NO. 360.

PHILADELPHIA COMPANY, Petitioner,

v.

CITY OF PITTSBURGH

NO. 361.

PHILADELPHIA COMPANY, Petitioner,

v.

HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee for Southern Traction Company 50-Year First Mortgage and Collateral Trust 5% Gold Bonds

REPLY BRIEF OF PHILADELPHIA COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

In support of Philadelphia Company's petition for writs of certiorari and in reply to respondents' briefs in opposition, we desire to make the following points:

1. The principles involved in this case do not depend on a peculiar or unique fact situation.
2. The Circuit Court's decision is not consistent with prior law.
3. The Circuit Court's decision, cannot be reconciled with this Court's decision in the Dipple case.
4. The public interest will best be served by reviewing the Circuit Court's decision.

1. The Principles Involved in This Case Do Not Depend on a Peculiar or Unique Fact Situation.

The City of Pittsburgh concedes that the present case is important (City's brief, p. 12), but argues that it turns upon the facts rather than the law. We submit, to the contrary, that the principles involved in this case are not limited to any peculiar or unique set of facts, but are applicable to innumerable fact situations. The same reasoning invoked by the Circuit Court of Appeals to ignore the entities of the underlier companies of Pittsburgh Railways Company could be invoked with respect to practically every railroad or street railway in the United States. The Third Circuit itself, only a few weeks after its decision in this case, was constrained to follow it as a precedent in a case involving a lessor company of the Erie Railroad. *New York Trust Co. v. New York and Greenwood Lake Railway Co.*, ...F. 2d .... (3 Cir.; July 17, 1946).

Even outside the railway field, in factual situations wholly unrelated to the present, the Circuit Court's reasoning would supply a technique for invoking bankruptcy jurisdiction which would practically make the Bankruptcy Act a dead letter. The established procedure for voluntary or involuntary petitions for reorganization will be wholly unnecessary if the same result may be achieved by invoking the existence of bankruptcy jurisdiction on the ground of a "public interest" which requires that corporations or "systems" have "proper economic foundations". Substantive rights will be materially affected if corporate entities may be ignored between non-affiliated corporations (as they were by the Circuit Court) and if the effect of their being ignored is

to transform leases into conveyances and to serve as a substitute for corporate mergers and consolidations.

A large part of respondents' briefs is devoted to a discussion of the facts of the case and to the merits of the Circuit Court's decision. We do not undertake to reply to this portion of their briefs because of limitations of time and space and because our argument on the merits would be premature at this time.

Insofar, however, as this Court may give weight to the facts in this case, we ask that it look to the findings of fact in the Special Master's Report. The Circuit Court has characterized this Report as "full and complete and most carefully done" (R. 943), and it provides, we submit, the only reliable guide to the facts.

With respect to the Map submitted with the City's brief, we ask the Court to bear in mind that this map presents only a partial picture in that it fails to give effect to the distinction between the three major systems, Consolidated Traction Company, United Traction Company of Pittsburgh and Pittsburgh Railways Company, a distinction amply demonstrated before the Special Master and observed by him in his Report (See, for example, R. 758, SMR 671). The City's map also fails to furnish any clue as to the contractual or corporate relationship (or lack of relationship) of the companies involved, just as the City's discussion of overlapping routes (City's Brief, p. 5) fails to take into account the Master's analysis of its evidence on this point (R. 770 SMR 711).

Respondents' statements of the facts contain innuendos that Philadelphia Company has been guilty of unfair dealing with the debtor and the underliers. These are unfounded. The Special Master concluded that no mismanagement had been shown (R. 823). The District

Court reached the same conclusion (R. 135 a) and the Circuit Court did not express any disagreement.

2. The Circuit Court's Decision Is Not Consistent With Prior Law.

We cannot agree with the City's assertion that the Circuit Court's decision is consistent with prior law. The Circuit Court frankly acknowledged as to the cases on which it relied (R. 950, n. 15) that:

> "Language broad enough to act as a foundation for the present decision is not lacking in these cases, *but in each instance the decision itself did not require such breadth.*" (Italics supplied).

None of these cases is a corporate reorganization case under Chapter X or 77B.[1] None of them involved leases or operating agreements comparable to those in the present case, and none of them involved the disregard of corporate entities between *non-affiliated* corporations.

Respondents do not comment on the practice of the Interstate Commerce Commission, nor do they deny our assertion (Phila. Co. petition for certiorari, p. 21) that the Circuit Court's decision is contrary to the Commission's practice in railroad reorganizations.

Insofar as the City relies on Finletter on Bankruptcy Reorganization (City's Brief, p. 20) to support the Circuit Court, it fails to call attention to the same author's statement (at page 140) that:

---

[1] The City cites (Brief, p. 22) *re Hotel Gibson Co.*, 11 F. Supp. 30 (D. C. Ohio, 1935), a 77B case which dealt with a real estate device peculiar to the State of Ohio. The Gibson case was not cited by the Circuit Court in the instant case.

> *"Since the debts of the subsidiary cannot be reorganized in the proceeding of the parent, the court has no general dominion over its property* and interference with the enforcement by third persons of their claims against that property will therefore not be allowed." (Italics supplied).

The City's reference (Brief, p. 23) to *Price v. Gurney,* 324 U.S. 100, 65 S. Ct. 513 (1945) does not take into account the following statement in that case which is clearly contrary to the decision of the Circuit Court in the present case (324 U.S. at 106; 65 S. Ct. at 516):

> "But under the Bankruptcy Act the power of the court to shift the management of a corporation from one group to another, to settle intracorporate disputes, and to adjust intracorporate claims *is strictly limited to those situations where a petition has been approved."* (Italics supplied).

Furthermore, the City treats the instant case as though it involved nothing more than long term leases. The fact is, to the contrary, that more than 75% of the property in question was operated by the debtor pursuant to operating agreements (R. 846, 654) which have been held to pass no title to the debtor. This was the decision of the Supreme Court of Pennsylvania in *Second Avenue Traction Company v. United Traction Company of Pittsburgh,* 328 Pa. 257, 195 A. 25 (1937), a case which the City, like the Circuit Court of Appeals, fails to take into consideration. The Second Avenue case, moreover, is consistent with the recent decision in *Thompson v. Texas Mexican Ry. Co.,* 324 U.S. 838, 66 S. Ct. 937, 942 (1946), where this court said:

"If we were dealing here with a lease, a suit to effect its forfeiture could not be maintained in another court without consent of the reorganization court. *But the trackage agreement created only a personal obligation and did not purport to grant Brownsville any estate in the property of Tex-Mex.*" (Italics supplied).

3. The Circuit Court's Decision Cannot Be Reconciled With This Court's Decision in the Dipple Case.

We submit that the City's attempt (City's brief, p. 31) to distinguish the Dipple case (*Philadelphia Co. v. Dipple,* 312 U.S. 168, 61 S. Ct. 538; 1941) is unsuccessful. The City refers to the Dipple case as one in which Philadelphia Company was "seeking special treatment for the underliers and for itself". The fact is, to the contrary, that the case was initiated by the Trustees of the Debtor, who sought instructions as to whether the taxes in question should be paid.

Neither can the Dipple case be explained as having been based solely upon a desire to avoid preferences among creditors. If this were true, it would have been necessary to refuse the payment of taxes on *all* of the property operated by the debtor, including the property of the debtor itself as well as the property of the underliers. Indeed, this would be especially true of the property of the debtor since it, of all property in the system, was least likely to earn a sufficient sum to pay its taxes (R. 774, SMR 732). Yet the Dipple case *permitted* the payment of taxes on the debtor's own property (312 U.S. at 175) while refusing to permit the payment of taxes of the underliers. Neither did the case make any provision for the payment by the debtor of taxes of underliers to the extent that the

assets or earnings of any given underlier were sufficient to permit taxes to be paid, a procedure which should have been followed if the avoidance of preferences had been the rationale of the case.

We submit that the Dipple case can only be explained as having been based on a clear distinction between the property of the debtor on one hand and the property of the underliers on the other, a distinction which the City now seeks to obliterate.

4. The Public Interest Will Best Be Served by a Review of the Circuit Court's Decision.

The City, like the other respondents, argues that the Circuit Court's decision is in the public interest and should not, therefore, be reviewed. We submit, on the other hand, that the Circuit Court's decision is itself contrary to the public interest by reason of the confusion which it will introduce into this case and into the law in general.

If this Court refuses certiorari, and if plan hearings are undertaken (on a plan as to which the City among others has already expressed its dissatisfaction) the hearings will be tormented with constant doubts and problems as to the effect of the Circuit Court's ruling on the jurisdiction of the Court, and on the relative rights of the parties. The Trustee's petition for clarification is typical of the problems which will be faced. These doubts and uncertainties will add unnecessary time and expense to the hearings and will, in all probability lead to further litigation. Even if a plan of reorganization be confirmed, the confusion inherent in this process will probably make necessary a further appeal to this court

which would call into question the very same problems now before this Court.

We suggest that the public interest requires, in a proceeding of this size and importance, that the parties be not cut loose to flounder in a sea of uncertainty, but that this Court should answer authoritatively the many problems which will vex this proceeding and numerous other proceedings as long as the Circuit Court's decision stands as a question mark before the legal profession.

Respondents' conception of the public interest requires, we believe, that violence be done to the Bankruptcy Law. They ignore the fact that the highest public interest is that which requires that legal proceedings be conducted according to orderly processes and according to the law of the land. That "public interest" is illusory which requires that the Bankruptcy Law be given a tortured construction or totally ignored. The confusion, and the ultimate disrespect for law, inherent in any such process would completely vitiate any short-sighted benefits which might be invoked in its support, even if such benefits existed.

Because of their impact on future litigation, the principles of the instant case must inevitably be reviewed by this Court at some time, either in this case or in some other case. We submit that the public interest will be best served, and the law rendered more stable and certain, by an immediate review.

Respectfully submitted,

THOMAS J. MUNSCH, JR.,
C. ELMER BOWN,
PHILIP A. FLEGER,
Attorneys for Petitioner.